No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

JOINT APPENDIX

*DAVID B. SMITH
DOROTHY S. COFIELD
*Counsel of Record
OREGONIANS IN ACTION
LEGAL CENTER
8255 S.W. Hunziker
Suite 200
P.O. Box 230637
Tigard, Oregon 97223
Telephone: (503) 620-0258

Attorneys for Petitioner

*JAMES M. COLEMAN
TIMOTHY V. RAMIS
TY K. WYMAN
*Counsel of Record
O'DONNELL, RAMIS, CREW & CORRIGAN
1727 N.W. Hoyt Street
Portland, Oregon 97209
Telephone: (503) 222-4402

Attorneys for Respondent

Petitition For Certiorari Filed September 29, 1993
Certiorari Granted November 29, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

INDEX

INDEX – Continued

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 28, 1991 – Dolans' application for site development review and a variance filed with the city.

September 17, 1991 – Tigard City Council affirms Planning Commission's order approving site development review with conditions imposing exactions on the Dolans' project.

October 4, 1991 – Dolans file their notice of intent to appeal with the Oregon Land Use Board of Appeals.

December 13, 1991 – Dolans file their amended petition for review with the Land Use Board of Appeals.

January 3, 1992 – City files its respondent's brief, answering the amended petition for review.

February 7, 1992 – Final opinion and order of the Land Use Board of Appeals, affirming the city's decision and holding the city's exactions were not unconstitutional.

February 28, 1992 – Dolans file their petition for judicial review with the Oregon Court of Appeals.

May 20, 1992 – Opinion of the Oregon Court of Appeals.

June 24, 1992 – Dolans' petition for review filed with the Oregon Supreme Court.

July 29, 1992 – Oregon Court of Appeals denies reconsideration.

October 27, 1992 – Oregon Supreme Court allows review.

July 1, 1993 – Opinion of the Oregon Supreme Court.

July 28, 1993 – Appellate judgment of the Oregon Supreme Court.

August 9, 1993 – Notice of appellate judgment of the Oregon Land Use Board of Appeals.

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN, Petitioners, vs. CITY OF TIGARD, Respondent.	LUBA NO. 91-161 NOTICE OF INTENT TO APPEAL (Filed Oct. 4, 1991)

I.

Notice is hereby given that Petitioners intend to appeal the land-use decision of Respondent entitled Notice of Final Order – By City Council, that became final on September 17, 1991, which involves a site development review appeal of tax map and lot number 2S1 2AC, Tax Lot 700, commonly referred to as 12520 S.W. Main Street, regarding the reconstruction of a general retail sales facility, A-Boy Electric Plumbing & Supply, with a new 17,600 square foot building on a 1.67 acre parcel, subject to fifteen (15) conditions. A copy of said Notice of Final Order is attached hereto, marked as Exhibit "A" and incorporated herein by this reference.

II.

Petitioners, John T. Dolan and Florence Dolan are represented by: Joseph R. Mendez of Knappenberger & Mendez, Attorneys at Law, Honeyman House, 1318 S.W. Twelfth Avenue, Portland, Oregon, 97201-3367, telephone (503) 294-0442.

Respondent, City of Tigard, has as its mailing address and telephone number: 13125 S.W. Hall Blvd., P.O. Box 23397, Tigard, Oregon, 97223, telephone (503) 639-4171; and has as its legal counsel: Timothy V. Ramis of O'Donnell, Ramis, *et al.*, Attorneys at Law, 1727 N.W. Hoyt Street, Portland, Oregon, 97209.

III.

Other persons mailed written notice of the land-use decision by City of Tigard as indicated by its records in this matter include: John T. Dolan and Florence Dolan, 405 S.E Brooklyn, Portland, Oregon, 97202.

NOTICE:

Anyone designated in Paragraph III of this Notice who desires to participate as a party in this case before the Land Use Board of Appeals must file with the Board a Motion to Intervene in this proceeding as required by OAR 661-10-050.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Trial Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 1991, I served a true and correct copy of this Notice of Intent to Appeal on all persons listed in Paragraphs II and III of this Notice, pursuant to OAR 661-10-015(2) by first-class mail, postage paid and deposited in the Post Office at Portland, Oregon.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Trial Attorney for Petitioners

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN,	)	
Petitioners,	)	LUBA NO. 91-161
vs.	)	
CITY OF TIGARD,	)	
Respondent.	)	

AMENDED
PETITION FOR REVIEW

Joseph R. Mendez, OSB #82333
KNAPPENBERGER & MENDEZ
1318 S.W. Twelfth Avenue
Portland, Oregon 97201-3367
Telephone: (503) 294-0442

Trial Attorney for Petitioners

David B. Smith, OSB #88315
Attorney at Law
P.O. Box 230637
Tigard, Oregon 97223
Telephone: (503) 620-0258

Of Attorneys for Amicus Curiae

James Coleman, OSB #76101
O'DONNEL, RAMIS, ET AL.
1727 N.W. Hoyt Street
Portland, Oregon 97209
Telephone: (503) 224-4402

Of Attorneys for Respondent

TABLE OF CONTENTS

AMENDED PETITION FOR REVIEW

STANDING OF PETITIONERS

The petitioners, John T. Dolan and Florence Dolan, appeared before the City of Tigard Planning Commission to appeal a decision of the Director placing certain conditions on their application for a variance to the Tigard Community Development Code in order to obtain the issuance of a building permit. The Planning Commission affirmed the Director's decision and Petitioners appealed to the Tigard City Council. In a Notice of Final Order and Resolution No. 91-66, dated September 17, 1991, the City Council allowed Petitioners' appeal in part and denied in part. Petitioners' [sic] filed a Notice of Intent to Appeal this decision as provided in ORS 197.830(1). Petitioners therefore have standing under ORS 197.830(2) to appeal to the Board.

STATEMENT OF THE CASE

Nature of the Decision and Relief Sought

The issues in the instant appeal were previously brought before the Land Use Board of Appeals and assigned LUBA number 90-092. Over the Petitioners' futility objection the Court supported the Respondent's exhaustion of administrative remedies argument and denied the appeal. Petitioners were instructed to pursue a variance to allow the City of Tigard to rectify its error. The Tigard City Council continues to condition the Petitioners' application for a building permit on a requirement that Petitioners give to the City of Tigard that portion of their property falling in the 100-year flood plain as well as an additional 15 foot strip of land which lies parallel and to the east of the flood plain boundary.

The City Council also refuses to reverse that portion of the Planning Commission's Final Order which requires the Petitioners to remove certain signage from an existing structure within forty-five days of receiving a permit to occupy the new building.

Petitioners seek reversal of these portions of the Planning Commission's Final Order, together with instructions consistent with the argument set forth herein.

Summary of Argument

1. The Planning Commission's Final Order constitutes a taking of Petitioners' property without compensation in violation of the Fifth Amendment to the United

States Constitution. The City of Tigard may not condition the grant of a building permit for a plumbing store upon the dedication of a 15 foot strip of Petitioners' property to the City for a bike path and a storm drainage project. For such a condition to be a valid exercise of the City's police power to regulate land use, the City must demonstrate that it bears a direct relation to the burden that will be created by the landowner's plans. The City of Tigard cannot demonstrate that Petitioners' proposal bears any relation to a perceived need for a bike path and a wider storm drainage channel.

2. The Planning Commission's Final Order constitutes a taking of Petitioners' property without compensation in violation of Article 1 Section 18 of the Oregon Constitution. The City of Tigard may not condition the grant of a building permit for a plumbing store upon the dedication of a 15 foot strip of Petitioners' property to the City for a bike path and a storm drainage project. For such a dedication to be a valid exercise of the City's police power to regulate land use, the City must demonstrate that its restrictions on a landowner's application bear some reasonable relation to the burden that will be created by the landowner's plans. The City of Tigard cannot demonstrate that Petitioners' proposal bears any relation to the need for a bike path and a wider storm drainage channel.

3. The City's exaction of Petitioners' flood plain property is indistinguishable from its exaction of 15 feet above the flood plain and violates the United States and Oregon Constitutions for precisely the same reasons.

4. The City has imposed a condition that an offending "roof sign" on the existing building must be removed within 45 days of obtaining a permit to occupy the new building. The condition is unreasonable, and constitutes a denial of due process.

Statement of Facts

Petitioners are the owners of a 1.67 acre lot on Main Street in the City of Tigard, on which there is an existing building used for the operation of a retail electric and plumbing supply store. Petitioners propose to build a larger building better suited to the needs of the business and to raze the existing building. Petitioners applied for a variance to obtain a building permit.[1] Planning Commission Final Order, Record, p. 11, 12.

The southwestern side of Petitioners' property borders Fanno Creek. *See Site Map*, Appendix B. The Community Development Code contemplates greenway adjoining and within the Fanno Creek flood plain. The City contemplated a future reconstruction of the storm drainage channel along the flood plain, necessitating a relocation (encroachment) of the flood plain bank five feet further into Petitioners' property. The Code also called for the eventual development of a community park

---

[1] Petitioners previously applied for a variance to City parking requirements for general retail sales businesses to provide only 39 parking spaces, as opposed to the 44 spaces required by the Community Development Code. The variance was reviewed by the Planning Commission and was granted subject to certain conditions, and this portion of the application is not at issue here.

(Fanno Creek Park) in the flood plain abutting Petitioners' property. The Code therefore contemplated eventual construction of a pathway giving access along the greenway to the park. Planning Commission Final Order, Record p. 11, 18, 19, 31.

To fulfill these planning goals, the Staff Report recommended that the permit be conditioned on the dedication by Petitioners to the City of the following land:

> 1. All portions of the site that fall within the existing 100-year flood plain (*i.e.*, all property below elevation 150.0); and
>
> 2. All portions of the site fifteen feet to the east of the 150.0 foot flood plain boundary: The first five feet to accommodate the contemplated eventual reconstruction of the storm drainage channel (and consequent relocation of the creek bank), and the ten remaining feet to provide adequate land for the bike path and vegetative screening.

The total land requested is approximately 7,000 square feet, of which 7,000 [sic] square feet falls above the flood plain boundary.

The Director noted the existence of a nonconforming "roof sign" on the existing building and imposed the following condition on issuance of any occupancy permit for the new building:

> • The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building. Condition No. 15, Record at p. 34.

Petitioners appealed the imposition of these and other conditions to the Tigard Planning Commission. The conditions were reiterated in a final order issued by the Commission on July 15, 1991. Petitioners appealed this Order to the Tigard City Council. The Council upheld the Planning Commission's Final Order with one amendment not relevant to the issues presented here.[2]

Petitioners have appealed to this Board.

JURISDICTION

LUBA has exclusive jurisdiction, pursuant to ORS 197.825(1), over Petitioners' appeal of the final land use decision by Respondent City. The City's community Development Code (hereinafter "CDC") provides that a variance may be approved when:

> 1. The proposed variance will not be *materially detrimental* to the purposes of this title, be in conflict with the *policies of the comprehensive plan*, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;
>
> 2. There are *special circumstances* that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

---

[2] The Planning Commission's decision eliminates condition of approval number 9 of the Directors Designee's Decision relating to the Traffic Impact Fee.

> 3. The use proposed will be the same as permitted under this title and City standards will be maintained to the *greatest extent that is reasonable* [sic] *possible* while permitting some economic use of the land;
>
> 4. Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms, or parks will not be *adversely affected* any more than would occur if the development were located as specified in the title; and
>
> 5. The hardship is not self-imposed and the variance requested is the *minimum variance which would alleviate the hardship*. CDC Section 18.134.050.A (emphasis added.) [sic]

From the emphasized portions of the CDC governing the approval of variances, it is apparent that the City's decision denying the Petitioners' variance required a significant exercise of factual judgment. This is true notwithstanding the fact that the variance was sought to site development review criteria in order to secure a building permit. Thus, the City's decision is within the exclusive jurisdiction of this board:

> In sum, under ORS 197.015(10)(b)(C) and ORS 197.825(3)(a), circuit court authority ends and the exclusive land use decisional process begins at the point where the granting or denial of a permit involves the exercise of judgment or the interpretation of an ordinance, rather than the mere ministerial application of an ordinance that requires no interpretation or judgment. *Campbell v. Bd. of County Commissioners*, 107 Or. App. 611, 616, ___ P.2d ___ (1991) (circuit court has no jurisdiction over mandamus action to compel denial of building permit.) [sic]

ASSIGNMENT OF ERROR NO. 1

The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year flood plain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 1

1.

Requiring the uncompensated conveyance of this property, as a condition upon the granting of a building permit, constitutes a violation of Petitioners' federal constitutional rights.

The issue presented by this and the prior appeal is whether the City of Tigard can insist that a landowner deed to the City 7,000 square feet of property, with no compensation, as a condition for permitting development. The City insists that the Petitioners permit a physical occupation of their property, that they donate their property interests. Without doubt, if a city official had simply shown up at the Petitioners' door *before* they sought a building permit, and advised them that they must grant this property to the City for a bike path, that act would be an unconstitutional taking.[3]

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987), the issue was

---

[3] The Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

whether the California Coastal Commission could condition its grant of permission to rebuild a house upon the dedication of an easement across landowners' beachfront property. The Supreme Court's analysis began with this proposition:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, *so long as it pays for them.* 483 U.S. at 831.[4] (Emphasis added.) [sic]

Thus, requiring an uncompensated conveyance of Petitioners'property outright, absent a permit application, would clearly be unconstitutional. Here, as in

---

[4] *See also, Loretto v. Teleprompter Manhattan CATV Corp,* 458 U.S. 419 (1982), involving the constitutionality of an ordinance requiring owners of rental property to provide cable television installation. The installation to which the landowner objected was a "minor but permanent physical occupation," 458 U.S. at 421, and the court held that it was a taking under the "historical rule" that a "permanent physical occupation of property is a taking" 458 U.S. at 441.

Nollan, the question then is whether requiring the property to be conveyed as a condition for issuing a land-use permit alters the outcome. And the answer here, as in *Nollan,* is that because the condition placed upon the issuance of a permit is unrelated to any burden created by the development, the outcome is the same: The City must either abandon the condition, or pay compensation for the taking.

The Nollans applied to the California Coastal Commission (CCC) for permission to replace the dilapidated bungalow which occupied their parcel of beachfront property with a larger modern residence. The CCC granted the Nollans' application for a permit on the condition that they allow the public an easement of access across their property from one public beach area to the other. On the first appeal the Ventura County Superior Court held that the condition could not be imposed without evidence that the Nollans' proposed construction would have an adverse impact on public access to the beach; the Court remanded for a hearing on that issue.

On rehearing, the Nollans argued that the demand for an easement across their land from north to south was unrelated to the structure they were building. The CCC disagreed, reaffirming its prior holding. It found that the new house would increase blockage of the view of the ocean and contribute to the development of a wall of residential structures along the coastal road; this, in turn, would prevent the public from realizing that it had a right to visit that stretch of coastline, thus impeding "psychological" access to the beach.

The Supreme Court analyzed the problem as follows. The Fifth and Fourteenth Amendments would prevent the CCC for an outright taking of an easement without compensation. *Nollan*, 483 U.S. at 831. On the other hand the Constitution does not prevent California from exercising its legitimate police power to prohibit construction on a particular parcel of land, if the police power prohibition "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." *Nollan*, 483 U.S. at 834. Thus a permit condition directed to the same valid police power end would not be a taking either.

> If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner and [sic] alternative to that prohibition which accomplishes the same purpose is ont. [sic] The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. *Nollan*, 483 U.S. at 836-837.

Because compelling a north-south easement along the beach is not reasonably related to the granting of a permit for a building that would not, in fact, interfere with the public's existing access to the beach, the CCC could not compel the easement. Because there is no reasonable relationship between the effect (burden) of the development (the blockage of view from east to west) and the condition imposed (a north-south easement) the exaction of an easement without compensation was unconstitutional.

> In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion. *Nollan*, 483 U.S. at 837.

Under *Nollan*, in order for a development exaction to pass constitutional muster, there must exist a clear match between the exaction and the particular adverse effects of the development. As a dissenter remarked:

> The Court finds this an illegitimate exercise of the police power, because it maintains that there is *no reasonable relationship between the effect of the development and the condition imposed*. *Nollan*, 483 U.S. at 842, Brennan, J., dissenting. (Emphasis Added.) [sic]

The question here is whether the restriction imposed by the City of Tigard upon Petitioners' application bears some reasonable relation to the burden that will be created by Petitioners' plans for a larger plumbing store. The City of Tigard seeks to exact 7,000 square feet of Petitioners' property on the ground that its Community Development Code authorizes a bike path in the Fanno Creek flood plain, and that the City requires a wider storm drainage channel in Fanno Creek. However, the construction of a larger store on the Petitioners' property is in no way related to the City's articulated need for a bike path. Nor has the City demonstrated that this development will place additional burdens upon the City's storm drainage requirements.[5] The nexus required between a burden created by the development and the

---

[5] It is not suggested anywhere in the record that this construction will contribute to the volume of upstream runoff.

condition imposed to offset that burden, between the effect of the development and the exaction, is entirely missing in this case.

The most the City of Tigard has demonstrated is a general public purpose. The construction of a bike path is part of its overall program for the Fanno Creek flood plain. However, *Nollan* makes it clear that a valid public purpose is not enough. Regarding the CCC's comprehensive program to provide public access to the beach, the court said:

> The Commission may well be right that that is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," by using its power of eminent domain for this "public purpose," see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it. *Nollan*, 483 U.S. at 841, 42.

Similarly, if the City of Tigard wants this property for a bike path, it must pay for it.[6] The provision of a bike path

---

[6] See also, Large, *The land* [sic] *Law of Scotland - A Comparison with American and English Concepts*, 17 Envtl. L. 1, 39 (1986) (Emphasis added) ("While different parts of the United States adopt different approaches to land use regulation, they all share an important common denominator: Basic control of land use, including the power to initiate a new use of the land, is left with the landowner, subject to government's powers to modify or prevent uses that are seen as particularly harmful to a protected public interest. *Government's power to initiate projects is limited to exercise of the power of eminent domain.*" (Emphasis added.) [sic]

and a wider drainage area are hardly related to the construction of a retail plumbing store which contributes neither to bicycle traffic, nor to the need for storm drainage. That the exaction is in furtherance of public goals (regardless of their desirability), does not render an otherwise invalid exercise of the police power constitutional.

2.

The City's exaction of 7,000 square feet of Petitioner's [sic] property violates Oregon Constitution Article 1, Sec. 18.

Oregon Constitution Article 1, Section 18 states: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation." The Oregon Supreme Court has never articulated a standard by which to apply this provision to conditions or charges imposed by local governments during the land development process.

In *Hayes v. City of Albany*, 7 Or. App., 277, 285, 490 P.2d 1018 (1971) the Court of Appeals upheld a sewer connection charge imposed by the City of Albany because the charge was "reasonably commensurate with the burden imposed or reasonably to be anticipated upon the City's sewage disposal system." This standard was followed by the Attorney General when he concluded that conditions upon the rezoning of land will be upheld:

> So long as they are reasonably related to the land or development for which the exaction is required, and would serve a public purpose such as mitigating negative impacts of the proposed use. 39 Op. Att'y Gen. 467, 472 (1979).

This Board adopted the "reasonable relation" standard articulated above with respect to development exactions in the companion cases of *O'Keefe v. City of West Linn* and *Skyland Investments, Inc. v. City of West Linn*, 14 Or. LUBA 284, 293 (1986). There the landowner applied to the City for approval of a hotel and convention center development that required a conditional use permit. The permit was approved subject to the installation by the developer of significant street and traffic signal improvements. The developer appealed imposition of these conditions on the grounds that its development did not so greatly affect traffic as to justify the City placing the entire burden on its project. This Board upheld the conditions, finding them to "reasonably related" to the proposed development. 14 Or. LUBA at 293. The addition of a hotel and convention center to the City of West Linn is a project clearly related to the City's traffic management program. The exaction was reasonable because it responded to a burden created by the development.

However the development exaction at issue in this case fails the "reasonable relation" test. The construction of a larger retail plumbing facility in Tigard is not related to the City's bicycle/pedestrian pathway plan, and places no burden upon it. This facility simply does not have any impact on the number of pedestrians and bicycle riders in Tigard. Nor will this development demonstrably contribute to Fanno Creek's storm drainage requirements. The only relation is that the proposed path traverses Petitioners' property, and the proposed drainage reconstruction encroaches upon Petitioners' property.

The proposed path traverses Petitioners' property to exactly the same extent, and the 15 feet is equally necessary, in the *absence* of construction of a new store. The City has simply seized the opportunity of an application for a building permit to take Petitioners' property without paying for it. The City's attempted seizure is not constitutionally permitted.

ASSIGNMENT OF ERROR NO. 2

The City Council's exaction of all portions of Petitioners' property falling within the 100-year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 2

The exaction of the flood plain is unconstitutional under precisely the authorities and for precisely the same reasons set forth above. Petitioners refer the Board to the Argument in support of Assignment of Error No. 1. There is no valid distinction between the exaction of 15 feet for a bike path and drainage and the exaction of Petitioners' flood plain property for greenway.

The City has failed to demonstrate that the proposed greenway in the Fanno Creek flood plain is related to the construction of a larger plumbing store on Petitioners' property. The only possible relationship is that the proposed greenway will encroach upon Petitioners' property. The greenway is not envisioned to offset any identified adverse affect of the proposed development. To require a

dedication of this property for greenway as a condition to the grant of a building permit cannot be justified by the City as an exercise of its police power. Under the authority of *Nollan v. California Coastal Comm'n, supra,* this exaction violates the Fifth Amendment to the U.S. Constitution.

The exaction of Petitioners' flood plain property also violates the Oregon Constitution. The greenway is not "reasonably related" to the plumbing store or its effects or burdens, and therefore this condition fails the test articulated by this Board in *O'Keefe v. City of West Linn, supra.*

Since the condition placed upon the issuance of the permit is unrelated to any burden created by the development, the City must either abandon the condition, or pay compensation for the taking.

ASSIGNMENT OF ERROR NO. 3

The City has characterized an existing wall sign as a "roof sign." By mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

The evidence is uncontradicted that the "roof sign" in question was a part of a parapet wall constructed on the existing building in order to join three small buildings into one structure and hide unsightly roof lines. Quite reasonably, the City has required that Petitioners obtain a

demolition permit prior to razing the existing building. The City has required that Petitioners move an entire retail facility from one building to another, seek and obtain a contractor for demolition, submit the necessary paperwork for a demolition permit, await the conclusion of the review process, obtain that permit and raze the existing structure, all within 45 days of receiving an occupancy permit for the new building. This is simply unreasonable.

At a previous meeting of the Planning Commission on August 8, 1989, the Director suggested that a lag time of 90 days between occupancy and demolition would be appropriate. The City has articulated no reasonable grounds for reducing the time period by half. This condition should be modified so as to grant Petitioners a reasonable period of time to demolish the existing building and remove the offending sign.

CONCLUSION

Preservation of greenway, a bicycle and pedestrian pathway, and storm drainage improvements along Fanno Creek are all valid, even laudable, public goals. However, private landowners cannot be compelled to donate land for such purposes. Petitioners' proposal to construct a larger building on this property does not increase the need for these services to be provided or these goals to be met. Therefore, the City cannot constitutionally condition the issuance of a building permit or a requirement that they hand over the deed to a portion of their property. If

the City needs Petitioners' land to accomplish public purposes, it must pay for it.

Respectfully submitted,

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Trial Attorney for
Petitioners

[Appendices reproduced, respectively, at Pet. App. G-1 and page 3 of this Joint Appendix.]

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN T. DOLAN AND FLORENCE DOLAN,	)	
Petitioners,	)	LUBA NO. 91-161
vs.	)	
CITY OF TIGARD,	)	
Respondent.	)	

RESPONDENT'S BRIEF

James M. Coleman,
OSB #76101
O'Donnell, Ramis, Crew
& Corrigan
1727 NW Hoyt Street
Portland, Oregon 97209
(503) 222-4402
Attorney for Respondent

Joseph R. Mendez,
OSB #82333
Knappenberger & Mendez
1318 SW Twelfth Avenue
Portland, Oregon
97201-3367
(503) 294-0442
Attorney for Petitioner

David B. Smith,
OSB #88315
6255 SW Hunziker,
Suite 200
P.O. Box 230637
Tigard, Oregon 97223
(503) 620-0258
Attorney for Amicus
Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGES

STATUTES

OREGON ADMINISTRATIVE RULES

TIGARD COMMUNITY DEVELOPMENT CODES

OTHER AUTHORITIES

I. STANDING

Respondent does not contest the standing of Petitioners John T. Dolan and Florence Dolan to file this Petition for Review.

II. STATEMENT OF THE CASE

A. Nature of Decision and Relief Sought

The land use decision which is before the Board is the disposition by the Tigard City Council of the appeal of a Planning Commission decision to approve a site development review, and approve and deny associated variances (SDR 91-0005, VAR 91-00100), subject to conditions. The Council's decision is set forth in Resolution No. 91-66 which appears in the record at pages 7-34.

The appeal by Petitioners of the Planning Commission's decision to the Council concerned the denial of requested variances which would have removed from the Planning Commission decision the requirements to (1) dedicate to the City a portion of the site located within a 100 year flood plain of the Fanno Creek Drainage Basin; (2) dedicate for pathway purposes 15 feet of the site located adjacent to the 150 foot elevation flood plain boundary; (3) remove a roof sign within 45 days of the

issuance of an occupancy permit for the new structure, and (4) eliminated the requirement of a survey at Petitioners expense for the boundaries of the dedication; and

The City Council decision eliminated the requirement for a survey of the boundaries. The portions of the City Council decision which have been appealed to this Board are the denial of requests for variances from the provisions of Tigard Community Development Code (CDC) Section 18.86.040.A.1.b., and 18.120.180.A.8. which require dedication of particular land, and Section 18.114.070.H. which prohibits roof signs of any kind.

B. Summary of Response to Assignments of Error

1. Assignments of Error 1 and 2

A condition of a land-use decision which requires the dedication of property does not effect a taking of property in violation of the Oregon and Federal Constitutions if it substantially advances legitimate state interests and the impact of the condition on the proposed development does not deny the owner an economically viable use of the land. The requirement of each constitution is essentially the same. There is no evidence in this record that the dedication required by the Tigard Code denies Petitioners an economically viable use of their land.

The State of Oregon, through ORS Chapter 197 and the adoption by the Land Conservation and Development Commission of statewide planning goals, has required the City of Tigard to regulate the use and development of land in a manner that promotes a coordinated transportation system which includes all modes of transportation,

provides recreational opportunities, and controls the quality and quantity of storm water runoff. The condition at issue substantially advances the regulation of those legitimate state interests.

Intensification of commercial development will increase demands on the City's transportation system, and the creation of additional impervious surface will increase burdens on the storm water management system.

The failure of an application in the City of Tigard to comply with all adopted standards for approval requires that the application be denied. The City of Tigard may condition the approval of an application upon subsequent actions which will insure compliance with adopted standards.

The CDC requirements of dedication of property within the flood plain, and property adjacent to the flood plain for pedestrian/bike path purposes, substantially carry out the state mandated requirements for local regulations promoting balanced transportation systems, recreational opportunities, and stormwater management.

2. Assignment of Error No. 3

Assignment of Error No. 3 essentially duplicates Assignment of Error No. 3 presented by petitioners in *Dolan v. City of Tigard*, LUBA 90-029 (Dolan I). Petitioners are precluded from raising issues in a subsequent proceeding before the Board which they raised, or could have raised, in a previous proceeding. The constitutional

issue raised in this Assignment of Error is not raised with sufficient specificity for the Board to decide the question.

C. Statement of Facts

Petitioners own a 1.67 acre parcel in downtown Tigard which is designated Central Business District on the Tigard Comprehensive Plan map and is zoned Central Business District-Action Area (CBD-AA). R 9. A 9,700 square foot retail sales building, occupied by a retail electric and plumbing supply business also owned by Petitioners, is located on the eastern edge of the subject parcel. The structure includes a large roof sign, and is adjoined by a partially paved parking lot. Fanno Creek flows along the western boundary of the site. R 10, 11.

In 1989 Petitioners applied to the City for a site development approval to replace the existing building with a 17,600 square foot retail sales building constructed on the western portion of the parcel and to pave a 39 stall parking lot. Petitioners proposed to demolish the existing smaller building after the new building is completed and the business moved into it. R 9-11.

Petitioners appealed the City's final determination on their request for site development review to this Board. Petitioners asked for a determination by the Board that certain conditions of approval concerning property dedication and sign removal constituted an unconstitutional taking of property without compensation. This Board in *Dolan v. City of Tigard*, LUBA No. 90-029, decided January 24, 1991, determined that before Petitioners could present their claims concerning constitutional violations with regard to the dedication requirements they first needed to

seek a variance to the code requirements through an available variance procedure. The Board denied assignment of error 3 which alleged that the sign removal condition constituted an unconstitutional taking of property.

Petitioners submitted another application for site development review approval for the same proposed development that was considered in Dolan I. In addition, they asked for variances to CDC Sections 18.86.040.A.1.b. and 18.120.180.A.8. which require dedication of land located within the 100 year flood plain and of land adjacent to the flood plain which is at a suitable elevation for construction of a pedestrian/bicycle pathway. R 158-160. They asked for a variance from the requirements of CDC Section 18.106.030.C.20. requesting a reduction in the required number of parking spaces from 44 to 39. The variance of the parking requirements was granted and is not an issue in this proceeding. Finally, a variance was requested from the provisions of Section 18.114.070.H. which prohibits roof signs of any kind within the City. R 8-9. The City Planning Director approved Petitioners' site development. review and imposed 16 conditions of approval. R 123. Petitioners appealed the Planning Director's decision to the Planning Commission challenging four of the conditions of approval. R 100-101. The Planning Commission deleted one condition of the Planning Director's decision dealing with the payment of traffic impact fees and denied the other portions of the appeal. R 82, 85, 58-85. Petitioners appealed the decision to the City Council challenging four of the conditions, including the two conditions which are at issue in this proceeding – which read as follows:

"1. The applicant shall dedicate to the City as greenway all portions of the site that fall within the existing 100 year flood plain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot flood plain boundary. The building shall be designed so as not to intrude into the greenway area. This condition shall be met prior to the issuance of building permits.

"15. The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the occupancy permit for the new building." R 56, 82-83, 85.

Petitioners in their appeal before the City Council also objected to the requirement that, at their expense, they survey and locate the boundary of the flood plain. R 56. After public hearing, the City Council allowed the appeal in part, denied it in part and modified the Planning Commission's decision. The Council's decision is set forth in Resolution No. 91-66. R 7-34. The City Council modified the Planning Commission's decision by deleting the requirement that the applicant be required to locate the flood plain boundary. The City Council adopted as its own the Planning Commission's Findings of Fact, Analysis and Conclusions with that one modification. R 7.

III. BOARD JURISDICTION

The decision of the Tigard City Council set forth in Resolution No. 91-66 is a final decision made by a local government concerning the application of a land use regulation. The Board has jurisdiction to review this land

use decision pursuant to ORS 197.825(1), 197.015(10)(a)(A)(iii).

IV. RESPONSE TO ASSIGNMENTS OF ERROR

A. Response to Assignments of Error 1 and 2

Petitioners combine their argument on Assignments of Error No. 1 and 2. Pursuant to OAR 661-10-030(3) (d), Respondent will likewise address Assignments of Error No. 1 and 2 in one combined argument.

Petitioners allege only that condition 1 of their site development review approval, which requires dedication of land within the 100 year flood plain and the portion of land lying 15 feet east of the 100 year flood plain boundary, constitutes an unlawful taking of property in violation of Petitioners' rights protected by the Oregon and Federal Constitutions.

Petitioners do not assign as error the City's interpretation or application of the variance criteria set forth in CDC 18.134.050. Petitioners do not challenge the City's authority to enact the regulations which require the dedication of land or the application of those regulations to this site. Petitioners do not challenge the evidentiary support for the City's decision.

The sole issue presented by Assignments of Error No. 1 and 2 is whether the imposition of the condition 1 requiring dedication of property results is a deprivation of property without compensation in violation of the protections found in Article 1, Section 18 of the Oregon

Constitution and the Fifth Amendment to the U. S. Constitution as applied to the City through the Fourteenth Amendment.

Petitioners claim that the condition imposed by the City violates both the Oregon and Federal Constitution. While the analysis under each constitution is essentially the same, the Oregon Supreme Court has not directly addressed a physical taking claim in the context of a land use approval. For that reason each analysis will be taken separately.[1]

1. Oregon Analysis

The Oregon Supreme Court has not dealt directly with a case similar to the facts presented in this matter. The Oregon Supreme Court has considered the application of Article I, Section 18 of the Oregon Constitution in the context of alleged taking claims due to the enactment of planning and zoning ordinance provisions. The

[1] The Oregon Supreme Court has held that the "basic thrust" of the Fifth Amendment to the Federal Constitution and Article I, Section 18 of the Oregon Constitution "is generally the same." *Suess Builders Co. v. Beaverton*, 294 Or 254, 259, 656 P2d 306 (1982). It has also noted that, while the criteria for determining whether a compensable taking has occurred under the Federal Constitution are not necessarily the same as those under the State Constitution, the Court has never addressed those possible differences. *Id.* The Oregon opinions have relied upon Oregon and Federal constitutional case law interchangeable [sic]. *See*, e.g., *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 608-614, 581 P2d 50 (1978); *Schoonover v. Klamath County*, 105 Or App 611, 806 P2d 156 (1991); *Department of Transportation v. Lundberg*, 100 Or App 601, 604-605, 788 P2d 456 (1990).

Supreme Court has stated the rule for analyzing takings under Article I, Section 18 of the Oregon Constitution to be that no taking has occurred unless the owner is precluded by the application of the subject land use regulation from all economically feasible private uses or that the regulation designation results in such governmental intrusion as to inflict virtually irreversible damage. *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 581 P2d 50 (1978).

The Supreme Court followed and applied the analysis set forth in *Fifth Avenue* in a case involving an alleged taking due to the designation of a site as a future park. *Suess Builders Co. v. City of Beaverton* 294 Or 254, 656 P2d 306 (1982). The Supreme Court also applied the *Fifth Avenue* analysis in *Dunn v. City of Redmond*, 303 Or 201, 735 P2d 609 (1987), a case involving an alleged taking due to the designation of property for open space purposes. The Supreme Court's analysis in these three cases was recently applied by the Court of Appeals in *Schoonover v. Klamath County*, 105 Or App 611, 806 P2d 156 (1991).

The *Schoonover* case involved an alleged unconstitutional taking of property due to the imposition upon a subdivision approval of a condition dealing with the provision of fire protection through annexation to a fire district. The Court held that the imposition of the condition did not preclude the use of the property and did not deny the owner an economic use. All four of these cases deal with use restrictions and not dedication requirements and therefore differ factually from this case.

The evidence in this record establishes that the 17,600 square foot proposed structure and associated 39 stall

parking lot can be accommodated on the site as proposed by the applicant. Mr. Dolan told the Tigard Planning Commission that he was flexible concerning the exact location of this building on the site as long as he is justly compensated for the dedicated land. R 88. The requirement for the dedication of property does not deny Petitioners an economically viable use of their land. They have determined that the expansion is a viable use, and the site can accommodate the proposed use after dedication.

Two cases which deal with sidewalk dedication requirements have been decided by the Oregon Court of Appeals. In *Martin v. City of Lake Oswego*, 69 Or App 170, 684 P2d 28 (1984), the decision of the city to condition the issuance of a building permit to enlarge an existing office building with a requirement that the property owner grant an easement or dedication for sidewalk purposes was challenged as an unconstitutional taking of property without compensation.

As in this case, the petitioners in *Martin* did not challenge the city's evidentiary findings or conclusions concerning the application of its city code provisions which required dedication. Also, as in this case, the petitioner did not contest the city's authority to require the dedication of land as a condition of granting the requested permit.

The Court of Appeals in *Martin* concluded that the evidence in the record established that the city's concern about the impact of future development on its streets, particularly in developing industrial areas, was a sufficient reason to abide by its own city code and require the

dedication. The court further concluded that the city adequately demonstrated in its decision that future use required the dedication as a condition of all development on collector streets and that such a requirement was well within the city's regulatory and constitutional authority.

The office building in that case was a 1,000 square foot building located on a collector street which the petitioner sought to expand by 685 square feet. The expansion, according to petitioner, would not add any employees but only enlarge the work space available for the existing work force, which constituted at that time four employees. *Martin v. Lake Oswego*, 8 Or LUBA 95, 96 (1983). The city argued that it had established within its comprehensive plan and code a comprehensive set of regulations and requirements to assure that development was served by adequate public facilities and services. The Court of Appeals concluded that the City had demonstrated that the proposed future use required dedication as a condition of development, that the City had established an adequate regulatory scheme and that it was within its constitutional authority to impose the dedication condition.

The Tigard Development Code has a similar complete and comprehensive set of provisions which provide authority for the imposition of the dedication condition. The bicycle/pedestrian path is called for in the general location along Petitioners' property in the City of Tigard's parks master plans and the Tigard area comprehensive pedestrian/bicycle pathway plan of 1974. In addition, CDC Section 18.120.180.A.8 requires that where development is allowed within or adjacent to the 100 year flood plain, the City shall require the dedication of sufficient

open land area adjoining or within the flood plain to accommodate the pathway shown on the pedestrian/ bicycle plan. The City's sensitive lands provisions, CDC Chapter 18.84, similarly requires the dedication of land within the 100 year flood plain. CDC 18.84.040.A.7. This section implements provisions of Tigard comprehensive plan policy 3.2.4 which requires dedication of undeveloped land within the 100 year flood plain. These requirements are based upon studies referenced in Volume 2 of the plan at section 3.2 and the master drainage plan for the City produced by CH2M Hill in 1981, concerning the need for public management of the storm water drainage system and for measures intended to increase flow efficiency of Fanno Creek and other drainage channels in the City.

Finally, the City's master plan for Fanno Creek Park identifies a portion of the Fanno Creek drainage area within the 100 year flood plain as ultimately being included within the Fanno Creek Park. Dedication of property within the 100 year flood plain for storm management purposes and the 15 feet adjacent to the 100 year flood plain for transportation system purposes has the collateral benefit of assisting in the implementation of the City's park master plan.

In *Dept. of Transportation v. Lundberg*, 101 Or App 601, 788 P2d 456 (1990), *rev. allowed*, 310 Or 393, 798 P2d 672 (1990), the Court of Appeals rejected an argument by the property owner that the City of Portland's ordinance requiring street dedication was an unconstitutional enactment. The owner contended first that the ordinance was unconstitutional on its face. The Court of Appeals held that the enactment of an ordinance does not constitute a

taking unless it denies an owner all economically viable use of their land. The Court cited *Martin* for the proposition that it had previously upheld a similar sidewalk dedication ordinance against the constitutional challenge. Again the Court looked at the evidence in the record and concluded that the owner had not shown that the ordinance deprived him of an economically viable use of his property.

In this case there is no taking of Petitioners' property in violation of Article I, Section 18 of the Oregon Constitution because the City of Tigard has enacted a complete regulatory framework to control development which requires the provision of adequate facilities and services to support development. Condition 1 implements that regulatory scheme. The impact of the dedication requirement does not deny Petitioners an economically viable use of their property.

2. Federal Constitutional Analysis

A land use regulation does not constitute a taking so long as it substantially advances a legitimate state interest and does not deny the property owner economically viable use of their land. *Nollan v. California Coastal Commission*, 483 US 825, 97 L Ed2d 677, 107 S Ct 3141 (1987). When the land use regulation results in a requirement that the owners of property either dedicate land or allow public access to private land the government's requirement must advance that legitimate state interest and there must be a sufficient relationship between the requirement of dedication and the governmental interest which is being advanced. *Nollan* at 836.

The State of Oregon has concluded that the uncoordinated use of land threatens the orderly development and environment and the health, safety, order, convenience and prosperity and welfare of the people of the state. The promotion of coordinated statewide land conservation and development requires the creation of the statewide planning agency to prescribe planning goals and objectives to be applied by cities throughout the state. ORS 197.005. The statewide planning goals enacted by the Land Conservation and Development Commission (LCDC) constitute mandatory statewide planning standards that must be applied and implemented by local governments through their comprehensive plans and implementing regulations. ORS 197.015(3), (5), (8); ORS 197.175(1), (2).

The State of Oregon, through the adoption of provisions of ORS Chapter 197 and the implementation of the requirements of that chapter by LCDC, has articulated a legitimate state interest in the coordinated and planned development and use of land within the state.

The LCDC has carried out its responsibilities under Chapter 197 through the adoption of the statewide planning goals. OAR 660, Div. 15. Of particular applicability in this matter are Goals 5, dealing with open space, scenic and historic areas, and nature resources; Goal 8, dealing with recreational needs; Goal 11, dealing with public facilities and services and Goal 12, dealing with transportation.

Goal 5 requires cities to conserve open space in order to protect nature and scenic resources. Cities must develop programs that will insure open space, promote

healthy and visually attractive environments in harmony with natural landscape character, protect natural resources for future generations and identify and manage natural resources such as water areas, wetlands, watersheds and ground water resources. In the guidelines for Goal 5, cities are directed to plan development so that needed amounts of open space are conserved and that natural resources and the physical limitations of land should be used as a basis for determining a quantity, quality location of rate and type of growth in the city's planning area. Goal 8 requires that the city develop plans and programs to satisfy the recreational needs of the citizens of the state through the siting of necessary recreational facilities.

Goal 11 directs that cities plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development. Development is to be directed to urban areas and cities are to plan for the provision of these facilities and services through the development of public facilities plans which describe facilities which are needed to support the land uses designated in the comprehensive plan.

Goal 12 directs that the city develop a transportation plan which shall consider all modes of transportation, including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian. LCDC has recently implemented Goal 12 through the adoption of the transportation planning rule. OAR Ch 660, Division 12. Provisions of that rule specifically address the inclusion of bicycle and pedestrian transportation facilities within the transportation system plan. Local governments are required to

adopt land use regulations which require the planning and provision of bicycle facilities providing safe and convenient pedestrian and bicycle access through commercial and industrial areas. OAR 660-12-020(2)(d); 660-12-045(3), (6).

A broad range of governmental purposes have been recognized as legitimate in the context of regulatory takings cases. Those legitimate purposes include protection against "air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood and other demonstrated consequences" of development. *Agins v. Tiburon*, 447 US 255, 261 n.8, 65 L Ed2d 106, 100 S Ct 2138 (1980). They also include preservation of landmarks, *Penn Central Transportation Co. v. New York*, 438 US 104, 129, 57 L Ed2d 631, 98 S Ct 2646 (1978); preservation of surface water drainage to protect public safety, *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 US 470, 485-86, 94 L Ed2d 472, 107 S Ct 1234 (1987); preservation of open spaces where "the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 US 1, 9, 39 L Ed2d 797, 94 S Ct 1536 (1974).

Given the breadth of these governmental purposes already recognized as legitimate, the Board should recognize that the purposes of the LCDC goals are also legitimate governmental purposes.

The City has implemented these state mandated requirements through its Comprehensive Plan and the implementing provisions of the Tigard Development Code. As support for the policies in the Comprehensive

Plan, the City has also undertaking studies and developed plans for its transportation system, its drainage system and its park system. The Council decision, at R 15-31, sets forth in detail a description and analysis of the requirements of the plan Code and the supporting documentation.

CDC Section 18.86.040 requires that development within the action area overlay zone must address transportation system requirements and facilitate pedestrian and bicycle circulation. R 16-17. Subsection (b)(i) of that section requires the dedication and construction of pedestrian bike paths such as the one required by condition 1, which are identified in the Comprehensive Plan.

In addition, CDC Section 18.120.180.A.8. requires that where development is allowed within or adjacent to the 100 year flood plan, the City shall require dedication of sufficient open land area for greenway adjoining and within the flood plain in accordance with the adopted pedestrian/bicycle plan. A small portion of the western edge of the site is within the 100 year flood plain of Fanno Creek. *See* Exhibit 37, large sheets, sheet 1, site plan. The Council found that the dedication is related to the applicant's request to intensify development of this site with general retail sales uses, at first, and other uses to be provided by Phase II at a later date. R 20. The Council found that it was reasonable to expect that customers and employees of future uses of the site could utilize a pedestrian/bicycle pathway adjacent to the development for their transportation and recreation needs. In fact, the site plan has provided for bicycle parking and a rack in front of the proposed building to provide for the parking and storage needs of the facility's

customers and employees. R 20. The Council concluded it was reasonable to expect that some of the users of the bicycle parking provided by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. The Council, at R 20-22, explains the linkages between dedication requirement and supporting data in the comprehensive plan.

There is similar support in the City's Comprehensive Plan and implementing regulations for the requirement of the dedication of the property within the 100 year flood plain for greenway and storm drainage management purposes. This portion of the City Council's decision is explained at R 27-31.

In summary, the dedication requirement within the flood plain serves two purposes which implement the state-wide planning goals and further a legitimate state interest. First, the requirement insures the maintenance of a greenway within the Fanno Creek flood plain which promotes the recreational needs of the citizens and, secondly, the Fanno Creek drainage is an integral part of the City's master drainage plan. The dedication of the flood plain area incorporates into public management these portions of the storm water drainage system. That system, as described in the master drainage plan produced by CH2M Hill, is in need of construction and upgrade to increase the flow and efficiency of the drainage system in order to accommodate planned growth.

The property within the 100 year flood plain is of limited economic value to Petitioners due to the fact that property within a 100 year flood plain is subject to severe development restrictions. *See* CDC 018.84.015A, E;

18.84.026. Additionally, the City will allow the area within the 100 year flood plain to be counted towards the 15% landscaping requirement for developments within this particular zone. R 23. Counting the total site area in the flood plain before dedication toward the 15% landscaping requirement of the zone frees the rest of the site for use for building or parking lot uses. Through dedication to the public, the City will assume maintenance and liability for this drainage channel, removing those economic burdens from Petitioners. By removing this portion of unbuildable land from the tax rolls, there will be an added economic benefit enjoyed by Petitioners through reduced value of the site and therefore reduced property tax liability.

Petitioners do not challenge the evidentiary support for the City's decision. The City cannot approve the requested site development approval without the imposition of a condition of dedication required by its Code. The City may impose conditions to carry out provisions of the plan and development Code. All development applications must comply with applicable standards. CDC 18.32.250.

Petitioners' main contention is that the City has failed to establish a direct linkage between this particular development and the required dedication. Petitioners argue that the *Nollan* case requires the City to establish a direct and empirical relationship between the demands created by a particular development and the extent of exactions. Such a precise and empirical fit is not required by the *Nollan* decision, nor should it be imposed by this Board. The linkage required by *Nollan* is between the articulated state interest and the condition.

The Supreme Court stated in *Nollan* that there are a broad range of governmental purposes and regulations which satisfy the Court's requirement that a regulation substantially advance legitimate state interests. The Court refers to landmark preservation, residential zoning, and scenic zoning as examples. 483 US at 835. The Court goes on to say that the California Coastal Commission unquestionably would be able to deny the Nollans a permit to build their house outright if their house "alone or by reason of cumulative impact produced in conjunction with other construction" would substantially impede such a legitimate governmental purpose articulated through a government regulation. There can be no question that the governmental purposes articulated in ORS Chapter 197 and implemented through the statewide planning goals and the City's Comprehensive Plan and Code are the type of legitimate state interests to which property owners can be subjected.

The Petitioners do not challenge the City's findings, at R 28, that increasing the intensity of this existing commercial development results in the creation of additional impervious surface (building coverage and parking lot), and therefore causes a greater impact upon the City's storm drainage system. Petitioners do not challenge the evidentiary support for the Councils [sic] findings, at R 20, that an increase in size of a commercial activity will result in an increased impact on the City's transportation system. The dedication requirements created by the City's Code are designed to assist the City in providing a timely, orderly and efficient arrangement of public facilities and services in this urban area in order to accommodate

development of not only the Petitioners' site but of other urban land within the jurisdiction of the City of Tigard.

The City code places upon each property owner the burden of participating in the provision of these public facilities and services as they develop their property. The alternative is for all property owners to wait until the services are provided by other means before development could occur. All properties are not equally situated. Some property will bear a different burden than others in the process of completing the urbanization of the City. These policy choices have been made by the City Council and are choices properly made through the political process. Petitioners dissatisfaction with these political choices are appropriately resolved through the political process through the changing of the laws of the City and state and not through resort to this Board and the court system.[2]

The City's Comprehensive Plan and implementing regulations are designed to accommodate planned land uses over time and provide adequate public facilities and services to those planned land uses. The United States Constitution does not prevent the Tigard City Council from making these choices and regulating development in the manner that it has chosen.

What the *Nollan* opinion states is required by the Fifth Amendment is a linkage or "nexus" between a

---

[2] The Ninth Circuit has recognized the political process as the appropriate forum for resolution of a grievance by a property owner of unequal treatment through application of a regulation that falls short of a taking. *Citizen's Ass'n of Portland v. Intern. Raceways*, 833 F2d 760 (9th Cir 1987).

permit condition which serves a legitimate state interest and a regulatory basis for which the application could be denied. If the California Coastal Commission had in place a regulation which was designed to protect the public's ability to view the beach, a condition which protected that public interest would be constitutional. Such a

> ". . . condition would be constitutional even if it constituted a requirement that the Nollans provide a viewing spot on their property for passers by with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Nollan*, 483 U.S. at 836.

In this case, the Petitioners' request for a development approval must be denied if all requirements of the City's Code are not satisfied. CDC 18.32.250. The dedication of land to allow improvements to the transportation system, the Fanno Creek Greenway and storm water management system are directly related to demands placed upon those systems through intensification of commercial development that will result from Petitioners' development. The essential linkage is therefore made between the condition and the governmental purpose to be served by the condition. Petitioners' development

which will result after the dedication condition is satisfied is economically viable because it is the same development which is proposed by Petitioner through the original development application, and there is no evidence in the record to the contrary.

The 9th Circuit recently analyzed the connection requirement in *Nollan* in the context of a development within the Tahoe Regional Planning Agency area of responsibility. *LeRoy Land Development v. Tahoe Regional Planning Agency*, 939 F2d 696 (9th Cir. 1991).[3] In that case, a development was conditioned upon the provision of mitigation measures (on and off-site) designed to minimize the adverse effects of urbanization on the Lake Tahoe Basin's ecological systems. Those requirements included installation of storm water dissipater devices, stabilization devices for cut slopes, the acquisition of adjacent and nonadjacent lands for open space and the mitigation of additional items identified in the environmental impact statement.

---

[3] There are numerous other federal cases which apply *Nollan*. However, most concern the application of a use restriction and not a dedication requirement. *See* e.g., *Commercial Builders of Northern California v. City of Sacramento*, 941 F2d 872 (9th Cir 1991); *Kaiser Development Co. v. City and County of Honolulu*, 913 F2d 573 (9th Cir 1990); *Associated Builders v. Baca*, 769 F Supp 1537 (ND Cal 1991); *McNulty v. Town of Indialantic*, 727 F Supp 604 (MD Fla 1989). One case deals with a dedication requirement and the analysis is similar to that set forth in *LeRoy Land*. *See Moore v. City of Costa Mesa*, 886 F2d 260 (9th Cir 1989) (condition requiring street dedication of 10% of parcel for street widening stated insufficient claim for unconstitutional regulatory taking).

The Federal District Court for the District of Nevada held that the off-site mitigation provisions were not reasonably related to the agency's purpose of mitigating adverse environmental effects caused by construction. This was because the provisions required off-site measures to stabilize the land of third parties.

The 9th Circuit disagreed and concluded that under *Nollan* the government may impose land use regulations so long as the regulations substantially advance legitimate government interests and do not deny the owner economically viable use of the land, 936 F2d at 699. The Court stated that in *Nollan* the Supreme Court examined the nexus between the asserted government interest (beach view) and the agency's condition (beach easement) and concluded that the condition failed to further that stated government interest. In *LeRoy Land*, however, the 9th Circuit found the relationship between the mitigation provisions and the Tahoe Agency's regulations to be clear. The Court found of particular importance in the Agency's scope of authority its charge to preserve Lake Tahoe's water quality. The plaintiff's property constituted an erosion hazard and its impervious surface exceeded the Agency's limits. The Court found that the off-site mitigation provisions ameliorate adverse environmental effects caused by the development and this directly furthers the governmental interest underlying the agency's regulations. *LeRoy Land Development v. Tahoe Regional Planning Agency*, 939 F2d at 699.

In the case before the Board, there is a similar linkage between the requirement that the City plan and provide for an adequate transportation, and storm water management system, and the imposition of a condition on an

intensification of commercial activity which requires the dedication of land to provide facilities for both transportation and storm water management systems.

B. Response to Assignment of Error No. 3

Assignment of Error No. 3 reads as follow [sic]:

> "The City has characterized an existing wall sign as 'roof sign' by mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process."

Assignment of Error No. 3 in the Petition for Review brought in LUBA Case No. 90-029 reads as follows; [sic]

> "The City's requirement that 'roof sign' be removed within 45 days of occupancy of the new building was unreasonable and hence a denial of due process."

The argument in support of Assignment of Error No. 3 in the Petition for Review is exactly the same as the argument presented in the Petition for Review in LUBA Case No. 90-029 with the exception of references to the record in this matter in the last paragraph of argument on page 16 of the Petition for Review. This Board in the final opinion and order in LUBA Case No. 90-029 denied the Third Assignment of Error. The denial was based upon the fact that there was no argument supporting an allegation of unconstitutionality being provided in the Petition for Review. *Dolan v. City of Tigard*, LUBA No. 90-029, Final Opinion and Order at p. 22. This Assignment of Error

should be denied on the same basis that it was previously denied in LUBA Case No. 90-029.

In addition, this Board has consistently refused to reconsider issues raised in a subsequent proceeding where they were raised and decided or could have been raised and decided in a previous proceeding. *Portland Audubon Society v. Clackamas County,* 14 Or LUBA 433 (1986), *Urquhart v. City of Eugene,* 16 Or LUBA 102 (1987), *Standard Insurance Co. v. Washington County,* 16 Or LUBA 717 (1988) at pp. 725, 726, *Nelson v. Clackamas County,* LUBA No. 89-151 (1990). The only new language in this Assignment of Error alleges that the sign is "mischaracterized" by the City. That issue could and should have been raised in Dolan I. This Assignment of Error should be denied.

V. CONCLUSION

The provisions of the Tigard Comprehensive Plan and Development Code implement a system of land use regulation required by the State of Oregon which constitutes a legitimate exercise of governmental authority. The City Code requires the Petitioners to dedicate property for transportation system, storm water management system and park purposes before the site can be developed. The application must be denied if that dedication of property does not occur. The condition requiring dedication carries out the City Code requirements. The proposed intensification of use will have an impact on the affected systems. There is no evidence in this record that Petitioners are not left, after the dedication occurs, with an economically viable use. The City's decision does not

effect a taking of property from Petitioners in violation of the Oregon and United States Constitutions.

O'DONNELL, RAMIS, CREW & CORRIGAN

By: /s/ James M. Coleman
James M. Coleman,
OSB #76101
Of Attorneys for Respondent

CERTIFICATE OF FILING

I hereby certify that on January 3, 1992, I filed the original of this RESPONDENT'S BRIEF, together with four copies, with the Land Use Board of Appeals, Suite 220, 100 High Street, S.E., Salem, Oregon, 97310, by first class mail.

DATED this 3rd day of January, 1992.

O'DONNELL, RAMIS, CREW & CORRIGAN

By: /s/ James M. Coleman
James M. Coleman,
OSB #76101
Of Attorneys for Respondent
City of Tigard

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 1992, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF by first class mail on the following persons:

David B. Smith
Attorney at Law
P. O. Box 230637
Tigard, OR 97223

Joseph R. Mendez
Knappenberger & Mendez
1318 S.W. 12th Avenue
Portland, OR 97201

DATED this 3rd day of January, 1992.

O'DONNELL, RAMIS, CREW & CORRIGAN

By: /s/ James M. Coleman
James M. Coleman,
OSB #76101
Of Attorneys for Respondent
City of Tigard

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN T DOLAN Petitioner FLORENCE DOLAN Petitioner v. CITY OF TIGARD Respondent	)	ORDER DENYING RECONSIDERATION CA A73769 SC S39393

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has on July 29, 1992, denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The Appellate Court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

/s/ GEORGE M. JOSEPH
CHIEF JUDGE

COPIES TO:

DAVID B SMITH	Attorney for Petitioner
JAMES M COLEMAN	Attorney for Respondent

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(5b).

PETITIONS FOR REVIEW

ALLOWED AND DENIED

(840 P2d 1295, 1296)

ALLOWED

October 27, 1992

Caplener v. United States National Bank (A65555)(S39422)(112 Or App 401)
Dolan v. City of Tigard (A73769)(S39393)(113 Or App 162)
Perez v. Bay Area Hospital (A66877)(S39242)(112 Or App 288)
State ex rel Kirsch v. Curnutt (A67772)(S39484)(113 Or App. 539)
State v. Davis, Dennis John (A68411)(S39509)(113 Or App. 118)
State v. Person, Gerald Oscar (A67862)(S39464)(113 Or App 40)
State v. Peterson, Herman William (A64607)(S39501)(114 Or App 126)
State v. Trueax, Michael A. (A68887)(S39353)(113 Or App 384)
State v. Wacker, Bart Dale (A62171)(S39421)(111 Or App. 483)

DENIED

October 27, 1992

Adcox v. Gencor Industries, Inc. (A69725)(S39486)(113 Or App 399)
Allen and Allen v. Children's Services Division (A70185)(S39450)(113 Or App. 751)

Allen, Paul M. and Allen, Jennica R. v. State of Oregon (A70182)(S39449)(113 Or App 751)
Allen v. Gallagher (A70181)(S39448)(113 Or App 751)
Bach and Bach (A70808)(S39593)(114 Or App 224)
Benton, Robert S. v. Maass (A72378)(S39469)(113 Or App 474)
Christenson, Keith v. Maass (A72582)(S39504)(114 Or App 437)
Elliott and Elliott (A69297)(S39516)(113 Or App 401)
Firth v. Burdell (A70780)(S39555)(114 Or App 233)
Fullerton v. Santos (A69123)(S39574)(113 Or App 751)
Giesy, Reid C. v. Board of Parole (A65240)(S39470)(113 Or App 474)
Gilbert, George D. v. Board of Parole (A67074)(S39460)(113 Or App 474)
Gilkey v. SAIF (A69991)(S39517)(113 Or App. 314)
Goodell v. Escobar (A71311)(S39577)(114 Or App 233)
Gordon, Dennis Leroy v. Board of Parole and Post-Prison Supervision (A69418)(S39398)(113 Or App 233)
Halstead, Sharon L. v. Board of Parole (A67400)(A67508)(S39461)(113 Or App 474)
Jack Gray Transport, Inc. v. Ervin (A66490)(S39512)(113 Or App 742)
Leitz v. Thorson (A68007)(S39491)(113 Or App 557)
McDonald v. United States National Bank of Oregon (A66109)(S39540)(113 Or App 113)
McElhaney, Eldon Wayne v. Board of Parole and Post-Prison Supervision (A71897)(S39391)(112 Or App 661)
McKay v. Maxwell (A66303)(S39520)(113 Or App 233)
Miller v. City of Dayton (A73904)(S39416)(113 Or App 300)

Morrow, Robert Glenn v. Board of Parole (A70344)(S39497)(113 Or App 752)
Neher and Zajac v. Tektronix, Inc. (A66308); Sherbeck v. Tektronix, Inc. (A66248)(S39405)(113 Or App 399) (Zajac's petition)
Neher and Zajac v. Tektronix, Inc. (A66308); Sherbeck v. Tektronix, Inc. (A66248)(S39493)(113 Or App 399) (Sherbeck's petition)
Pruneda, Beatrice v. Board of Parole (A68503)(A68987)(S39465)(113 Or App 474)
Reeser v. Long (A66888)(S39308)(112 Or App 636)
Sheppard v. Kaiser Cement Corp. (A70695)(S39602)(114 Or App 151)

BEST AVAILABLE COPY

1

PHASE I ← → PHASE II

SITE STATISTICS

AREA	71,500#	= 100%
PHASE I	= 50,000#	
BLDG	= 17600#	35%
PAVING	= 20,200#	40%
WALKS	= 1,820#	4%
LANDSCAPE & NATURAL	10,380#	21%

TAX LOT 700 LOCATED IN THE SW 1/4 OF NE 1/4 SECTION 2 T2S - R1W (21-2-AC)

CONST TYPE - V-N
OCCUPANCY - B2
(RETAIL / WHSLE SALES, WHSE)

GENERAL NOTES & SPEC'S

JOB # 88037 FEB. 20, 1989

1. Verify & confirm all existing conditions and dimensions prior to fabrication or construction. Notify & coordinate any changes with engineer before proceeding.

2. DESIGN LOADS:
   A) Roof LL = 25 psf
   B) wind load 80 mph (B) UBC
   C) seismic zone 2
   D) soils capacity = 1500 psf

3. Footings to rest on firm natural undisturbed soil; free of organics or other deleterious material 12" min. below orig./final grade. Over excavate as required if necess, ary to firm bearing. Compacted crushed rock may, with engineer's's appv'l, be used to bring up grade to orig. intended level.

4. Concrete to be f'c = 3000 psi @ 28 days (min). Protect all concrete from inclement weather and impact until sufficient strength is developed to prevent damage.

5. Reinforcing to be ASTM Gr 40 (deformed) except as noted.

6. Concrete masonry units to comply with ASTM C-90 grade n, type 1 (half & half) with moisture content not to exceed 30 % of total absorption. Protect and maintain dryness until laid in wall.

7. Mortar shall be type 'S' ASTM C-270 (assumed f'c = 2500)

8. Grout to be F'c = 3000 psi @ 28 days with 1/2" max aggregate size & 9" slump. Grout fill all cells containing reinf., embeded items, or below grade.

9. Typical wall reinforcing to be:
   A) #5 @ 4'-0" o/c, wall ends & corners (vert)
   B) #5 @ 4'-0" o/c, tops of wall, bot of wall & as shown or indicated on dwg's (horiz)
   C) (2) # 5 around and 24" (min) past all opn'gs. (UON)

10. Steel to be:
    A) plates & open sections, ASTM A-36
    B) tubes, ASTM A-500
    C) bolts, ASTM A-307
    D) welds, AWS E-70 (1/4" UON)
    E) All steel to have a shop coat of rust inhibiting primer & be coated with a asphaltic emulsion where below grade.
    F) Fabricate & erect steel according to AISC spec's.

11. All nails to be 'common' or galv. (hot dip only) box. Except roof sheathing to be 'ringshank'. No 'sinker' nails allowed.

12. All wood in permanent contact with masonry or concrete to be pressure treated per req's of ASTM D-1760. Roof ledgers 4x10 & larger may be protected with 55# felt or galv sheet metal smaller members must be treated.

13. "x" brace all joists @ 8'-0" max o/c and solid block over all bearng points. fire block all stud walls at 10'-0" (max) o/c, at ceilings and roofs.

14. Lumber grades:
    A) studs, #2 & btr DF-L (KD)
    B) plates & blocking, #2 & btr DF-L
    C) joists and ledgers, #2 & btr DF-L
    D) headers & beams, #1 & btr DF-L (UON)
    E) Lam's, Fb=2400, Fv=145, Fcl=455 DF (industrial) with exterior glue, Load wrap. Radius = 2000' (simp span) (no camber on cantilever beams).
    F) Roof sheathing to be APA 42/20 (ext) plywood, OSB, or "COMPLY". Nail sht'g with 8d @ 6" o/c along panel edges and 12" o/c along interior supports. Solid block edges within 12' of walls and be aligned with building "stop".

15. Roofing to be Owens Corning # 33-IC with white cap sheet (UL CLASS A).

16. Fascia metal to be ECI #H1005 "slim rib" 26 ga as mfg'd by Engineered Components Inc. Tualatin, OR. Installed according to the Mfr's instructions. (Or approved eq.) provide flashing etc color matched to complete.

17. Insulation to be:
    A) floor, 2" "blue board" @ perimeter.
    B) walls, (NA)
    C) roof, R-19 rigid (at heated areas only)

18. Glazing to be in accordance with CH 54 (all) UBC and be safety glazed when in or within 1'-0" of doors, in other hazardous locations and/or as reqd by UBC.

19. Restroom finishes:
    A) floor, sheet vinyl
    B) base, 6" rubber
    C) wainscote, plast laminate on WR gyp. bd.
    D) wall, enamel on WR gyp. bd.
    E) ceil, enamel on gyp. bd.

MECHANICAL, ELECTRICAL & PLUMBING BY SEPERATE PERMIT. Mech. to provide (15) cfm / occupant & (8) air changes / hr in restrooms.

ALBERT R. KENNEY, JR. PE
CONSULTING ENGINEER/PLANNER
(503) 244-9811 FAX 244-3017
236-1551 OR 682-0491

A PROPOSED BLDG For
MR JOHN DOLAN &
A-BOY STORES / GLOBE LIGHTING

DATE 4-22-88, 3-8-89

JOB NO 88037

SDR 89-13